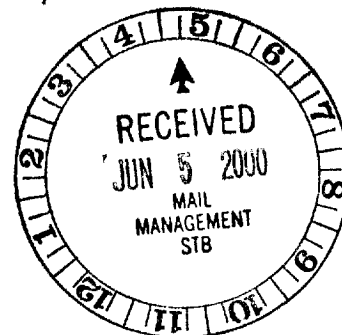


THOMPSON  
HINE & FLORY LLP

*Attorneys at Law*

June 5, 2000



Via Hand Delivery

The Honorable Vernon A. Williams  
Secretary  
Office of the Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

ENTERED  
Office of the Secretary  
JUN 05 2000  
Part of  
Public Record

ATTN: STB Ex Parte No. 582 (Sub-No.1)

Re: STB Ex Parte No. 582 (Sub-No.1); *Major Rail Consolidation Procedures*

Dear Secretary Williams:

Please find enclosed for filing in the above-referenced docket an executed original and twenty-five (25) copies of the Joint Reply Comments filed on behalf of Otter Tail Power Company, Public Service Company of Colorado, Southwestern Public Service Company, TUCO INC., Tucson Electric Power Company and Western Resources, Inc. An extra copy of this filing is enclosed for stamping and return to our office. Also enclosed is a diskette compatible to WordPerfect 7.0 with a copy of the Joint Reply Comments.

Should you have any questions concerning this filing, please do not hesitate to contact the undersigned. Thank you for your cooperation and assistance in this matter.

Respectfully submitted,

*Thomas W. Wilcox*

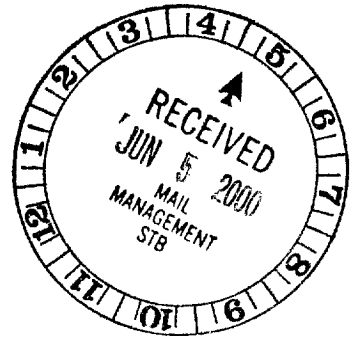
Thomas W. Wilcox

*Enclosures*

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES



ENTERED  
Office of the Secretary

JUN 05 2000

Part of  
Public Record

**JOINT REPLY COMMENTS OF CERTAIN COAL SHIPPERS**

Otter Tail Power Company ("OTP"), Public Service Company of Colorado ("PSCo"), Southwestern Public Service Company ("SPS"), TUCO INC. ("TUCO"), Tucson Electric Power Company (TEP"), and Western Resources, Inc. ("Western") (referred collectively herein as "Joint Commenters"), hereby submit the following Reply Comments in accordance with the procedural schedule outlined in the Board's Advance Notice of Proposed Rulemaking ("ANPR") issued in this proceeding on March 31, 2000. The identities and interests of Joint Commenters are summarized in the Comments of Certain Coal Shippers, filed in this docket on May 16, 2000 ("Initial Comments").

In these Reply Comments, Joint Commenters focus on several aspects of the initial comments filed by several parties, particularly the major Class I railroads, that address proposed changes to the STB's merger policy mentioned in the ANPR and discussed by Joint Commenters in their Initial Comments. These proposals include (1) adopting a policy goal of enhancing rail competition instead of merely seeking to preserve rail competition; (2) adopting rules designed to ensure the improvement of rail service after a major rail merger and remedying harms caused to shippers by poor service post-merger; (3) modification of the Board's "bottleneck" rules; (4)

abrogation of the “one lump theory” utilized by the Board to deny relief to captive shippers in rail mergers; and (5) requiring reciprocal switching and terminal trackage rights as a condition for approval of a rail merger.

**I.**  
**The Need to Enhance Railroad Competition Instead of  
Merely Attempting to Preserve Perceived Pre-merger Competition**

In their Initial Comments, Joint Commenters strongly urged the Board to conduct this salutary broad examination of its merger rules with the goal of adopting changes to the regulations that will facilitate improved service in the railroad industry by enhancing meaningful competition between the major Class I railroads. In the ANPR, the Board stated that the time has come to examine whether the merger policy should be revised to enhance, rather than merely preserve railroad competition. Such a change in policy would clearly be within the Board’s extremely broad authority to condition its approval of rail mergers under 49 U.S.C. §11324(c).

The Board’s consideration of this policy change was also viewed favorably by numerous other parties in their initial comments in this proceeding for many of the reasons cited by Joint Commenters, as well as valid additional reasons. However, not surprisingly, the major Class I railroads have asked that the Board reconsider this idea and make any changes to existing merger policy within the present policy framework of attempting to preserve pre-merger rail competition rather than enhance rail competition as the *quid pro quo* for permitting further consolidation of the railroad industry.<sup>1</sup>

---

<sup>1</sup> For example, BNSF proceeds from the astounding premise, in the face of overwhelming evidence to the contrary, that the existing merger policy and its implementation “has worked well for shippers, the public, the Board, and railroads.” BNSF Comments at 8.<sup>1</sup> Accordingly, BNSF offers no meaningful suggested changes to the existing merger policy from a competition standpoint, and rejects entirely the possibility of the Board revising its policy so as to enhance, rather than merely try to preserve competition.

Several of the major Class I railroads assert that such a change in the Board's merger policy would be contrary to law. BNSF Initial Comments at 12; NS Initial Comments at 30; CN Initial Comments at 31. BNSF and NS offer no legal basis for such a claim. The legal arguments advanced by CN in support of its position that enhancing rail competition would exceed the Board's conditioning authority are not persuasive. CN attempts to fashion an argument that seeking to improve the rail industry and rail service through enhancing rail competition is somehow inconsistent with "the public interest" because it exceeds what CN apparently views the public interest to be at the present time. *Id.* However, even CN must concede that the STB has broad authority to determine that an increased emphasis on rail competition in the context of rail mergers is in "the public interest," and can condition its approval of mergers accordingly.

Proceeding from their collective conclusion that the STB should not revise its merger rules to facilitate enhancement of rail competition, the major railroads either offer no proposed changes at all to the existing policy towards competition (CSX) or propose very narrowly drawn modifications that provide little opportunities for captive shippers especially to even preserve their competitive options, let alone improve their competitive options and rail service (UP, CN, BNSF, NS).

However, it should be clear to the Board from the testimony of the hundreds of participants in Ex Parte 582, *Public Views on Major Rail Consolidates*, and from the initial comments filed in this proceeding by Joint Commenters and other parties, that to continue to try to achieve a policy goal of merely attempting to preserve pre-merger competitive levels will continue the downward spiral of the rail industry that began with the merger of the Burlington Northern Railroad Company and The Atchison, Topeka, and Santa Fe Railway Company, and

continues to this day. The Board should therefore resist limiting its consideration of changes to its merger rules with the aim of reaching a policy goal of merely preserving pre-merger competitive levels instead of enhancing competitive options of rail customers. It is only by establishing the latter policy goal that the ultimate goal: the restoration and/or establishment of reliable, cost effective rail transportation for all rail customers, will be reached.

## **II. Improving and/or Maintaining Rail Service Levels**

One of the primary drivers of the ANPR is the widespread recognition that rail service levels substantially deteriorated after recent major rail mergers, and the need to prevent such service failures from occurring as a result of future rail mergers. The deep concerns of many rail shippers and some railroads regarding railroad service levels were reflected in the oral and written testimony submitted during the hearings held in Ex Parte 582, and were again reflected in the comments submitted by Joint Commenters and by many other participants in these initial comments in this proceeding. Indeed, all of the major Class I railroads recognize the current rail merger policy regarding rail service is inadequate. (*See, e.g.*, Initial Comments of NS, CP, CN, CSX, BNSF, and UP). As such, most of the major Class I railroads support a change to the policy to require that detailed “service integration plans” be submitted as part of a major rail merger application, a concept that Joint Commenters fully support. *See*, Initial Comments at 12-13.

Many commenters, including Joint Commenters, also advocate much closer scrutiny of service-related aspects of proposed combination by the Board during the merger application process, and giving greater weight to the service plan in deciding whether to approve the merger. The major Class I railroads appear to be split on this point. For example, NS advocates a detailed service implementation plan, which would be closely scrutinized and accorded

“substantial weight” by the Board. NS Initial Comments at 18-20. In contrast, BNSF supports a more detailed service plan as part of the application, but does not want the STB to establish the level of detail for the plan and does not propose how much weight should be accorded the plan. BNSF Initial Comments at 17.

UP proposed a specific regulatory mechanism by which a consolidated railroad could be held accountable for failure to implement an approved service implementation plan. UP Initial Comments at 9. Unfortunately, UP’s proposal as currently written is a nonstarter because it permits service levels to deteriorate to below 50% of pre-merger levels for more than 60 consecutive days before any relief can be obtained, then gives the consolidated railroad another 60 days to “cure” its service problems by merely returning service to the 50% level. *Id.* This is completely unacceptable to Joint Commenters, which can normally withstand not more than 30-45 days of service before coal inventories are depleted and damages are incurred. Initial Comments at 11. In addition, UP’s proposed rule apparently would consider a service deficiency “cured” if service returned to the 50% level for a single day! Moreover, even if a shipper could make the requisite showing for relief, UP’s proposal would permit the railroad to petition to terminate relief once service was returned only to 50% of pre-merger levels. UP Initial Comments at 9. Given the severe service problems associated with past major rail mergers, there is no reason for the Board to allow any deterioration in service after a rail merger and place the risk of service failures on the backs of the customers of the merged railroad.<sup>2</sup>

The other major Class I railroads essentially propose that any specific remedies for service deterioration either be negotiated between the railroads and the shippers (BNSF) or come

---

<sup>2</sup> In this regard, Joint Commenters vigorously disagree with NS that service improvements should be measured looking at the merged rail system as a whole, meaning that the Board’s merger policy would condone the deterioration of service to some shippers to the point that they are harmed by the merger. NS Initial Comments at 18-19, note 13.

from existing regulations (NS).<sup>3</sup> CSX goes so far as to assert that the Board does not have the expertise to review and adjust service-related claims, even though the Board has done just that quite recently.<sup>4</sup>

BNSF, for example, states that merger applications should contain “reasonable assurances that the quality of service will be maintained for affected shippers, including standards for measuring performance and service guarantees.” BNSF Comments at 17. BNSF would then permit the STB to determine whether the “as-filed” program of service assurances is adequate in the merger proceeding. However, BNSF’s proposal apparently would not permit the STB to amend the “as-filed” plan. *See* BNSF Initial Comments, Appendix A-2; *see also Id.* at 18 (The Board should leave [the form of guarantees] to private negotiations,” and “. . . the Board “should not define the contents of service guarantees . . .”). Since captive shippers do not possess the bargaining power to extract meaningful service guarantees from railroads with a monopoly over their service, BNSF’s proposal provides Joint Commenters little comfort.<sup>5</sup>

---

<sup>3</sup> NS’s comments are inconsistent on this point. On the one hand, NS states that “the extent to which applicants in particular major rail consolidation proceedings are willing to offer specific service commitments, or remedial measures in the event they experience merger-related service disruptions, should be an element in deciding whether the proposed consolidation should be approved.” NS Comments at 19, note 14. This implies that the Board could deny a merger if the applicants failed to offer any meaningful commitments or remedial measures to shippers regarding service, or make any such offerings an enforceable condition for approving the merger. However, NS ultimately concludes that any remedies for service deficiencies post merger must come from existing regulatory remedies available to all shippers outside of the merger context, not from a “new remedial scheme to deal with merger-related service degradation.” *Id.* At 22-24.

<sup>4</sup> STB Finance Docket No. 32479, *Caddo Antoine and Little Missouri Railroad Company--Feeder Line Acquisition--Arkansas Midland Railroad Company Line Between Gurdon and Birds Mill, AR; Dardanelle & Russellville Railroad Company--Trackage Rights Compensation--Arkansas Midland Railroad Company; GS Roofing Products Company, Inc., Beazer West, Inc., D/B/A/ Gifford Hill & Company, Bean Lumber Company and Curt Bean Lumber Company v. Arkansas Midland Railroad Company and Pinsly Railroad Company, Inc.* 2000 STB LEXIS 252, served May 5, 2000.

<sup>5</sup> BNSF’s prospective merger partner, CN, states only that the STB “might require applicants to identify elements of service guarantees that the railroad would negotiate with shippers.” CN Initial Comments at 13. BNSF and CN clearly have no intention of agreeing to any changes to the STB’s merger regulations that would impose regulatory remedies for service failures of their consolidated railroad beyond measures proposed by BNSF and CN.

If the Board determines that it cannot, or does not desire to, preside over service related damage claims, it should nevertheless adopt rules or merger conditions that (1) require the consolidated railroad to supply detailed service-related data to the STB and rail customers – a requirement endorsed by CP (CP Initial Comments at 10); and (2) provide an expedited mechanism, such as binding arbitration, by which service related damage claims can be heard. Moreover, the Board should clearly establish that the remedies available to rail shippers include being made whole for all direct and consequential damages, and also access to an alternative rail service provider via trackage rights until service is restored to adequate levels.

In its Initial Comments, NS stated that “[m]ajor railroad mergers should result in better, not worse service to shippers. If a proposed merger cannot produce better service, it should not be approved.” NS Initial Comments at 18. Joint Commenters readily agree with this policy goal, and submit that the Board strive to achieve this goal by (1) adopting regulations that require the merging railroads to submit a detailed plan addressing rail service issues which will be closely scrutinized during the application process, and (2) adopting regulations that enable rail shippers to expeditiously be made whole for all damages caused to them by a consolidated railroad that is unable to fulfill the promises regarding service contained in the merger application.

### **III.**

#### **Bottleneck Rate Relief and Abrogation of the “One Lump Theory”**

If the Board is to pursue a policy of enhancing rail competition, rather than merely attempting to preserve pre-merger competition levels, then the Board must permit captive shippers to request and obtain rail rates over so-called bottleneck segments of track, whether or not the bottleneck was created by the merger or preceded it. Moreover, the STB must eliminate the “same origin” restriction to seeking bottleneck relief. Initial Comments at 10.

Some of the Class I railroads support a limited type of bottleneck relief in the form of requiring merging railroads to maintain open gateways and supply bottleneck rates from the gateway to the facilities of captive shippers.<sup>6</sup> Although these proposals are a step in the right direction, they are too limited in scope. *See* BNSF Comments at 22-23 (relief would be apparently be available only from “major gateways” that accommodated “significant traffic flows” prior to the merger); *see also* NS Initial Comments at 50 (bottleneck relief would be limited to “major gateways used pre-merger by the shippers for the interline movement of a significant volume of traffic.”); *See also* CN Initial Comments at 31 (apply “contract exception” to the Bottleneck Rules post-merger, without further amendment). Such a narrow band of relief does little to enhance, or even preserve competition, because it greatly restricts the shipper’s ability to try to establish lower joint line rates by combining a bottleneck rate with a rate to an interchange or interchanges that may not have not been used by the shipper previously, but nevertheless provide a feasible means to gain access to a competing rail carrier “above” or “below” the bottleneck.

UP’s proposal regarding bottleneck rates would be even more restrictive, and would provide essentially no relief to coal shippers like Joint Commenters who ship coal from the Wyoming Powder River Basin. Specifically, under UP’s proposal, no shipper could request a bottleneck rate if any merger applicant had single line service to the shipper’s facility for which the rate was being requested. UP Initial Comments at 12. If BNSF or UP proposed to merge with another railroad, this restriction would eliminate all coal facilities presently captive to either BNSF or UP for deliveries of PRB coal, or coal from any other western mine. Moreover, UP’s proposal would require shippers challenging the reasonableness of a bottleneck rate to establish

---

<sup>6</sup> On the other hand, CSX and CP merely recommend that the Board maintain the status quo regarding bottleneck rates in the context of a rail merger.

that the “Participating Carrier” was market dominant for the entire movement from origin to destination, not just the bottleneck segment. This proposal is contrary to established Board precedent and, to the extent a captive shipper was able to obtain a rate established by competition for non-bottleneck segments of track, would defeat ability of the shipper to obtain any rate reduction from that competition. Specifically, since market dominance could not be demonstrated for the entire movement, the STB would have no jurisdiction to regulate the bottleneck rate, allowing the bottleneck carrier to obtain all of the savings from competition “above” the bottleneck. The STB’s rules governing challenges of the reasonableness of bottleneck rates should not be changed.

The major Class I railroads object to the Board’s proposal to reconsider its application of the “one lump” theory in rail mergers. See UP Initial Comments at 15; NS Initial Comments at 50-51. However, even the railroads’ own narrowly drawn proposals regarding bottleneck rates demonstrate the fundamental inconsistency between the Bottleneck Rules and the “one lump” theory. Specifically, the basis for the railroads’ limited proposals regarding open gateways and bottleneck rates, such as they are, is a recognition that when the merger of a bottleneck carrier with a “neutral” carrier results in the consolidated carrier obtaining single line service from origin to destination, “the transaction results in a loss of competition between the pre-merger connecting carriers.” NS Initial Comments at 51. The assumption, and the limited railroad proposals, presume that the benefits of such competition flow through to the captive shipper. This is also the underlying premise of the “contract exception” to the bottleneck rules.

However, under the “one lump” theory, it is presumed that, even if there is pre-merger competition between railroads on the non-bottleneck segments of the movement, none of rate reductions from this competition would have been realized by the captive shipper prior to the

merger because the bottleneck railroad would have “soaked up” all of the savings in the rates it charged for its part of the movement. The theory holds that the shipper therefore cannot be harmed by the merger. The Board has denied numerous requests for relief in rail mergers based on this theory. But a requirement that merger applicants provide bottleneck rates which can be discretely challenged for reasonableness – which some of the major Class I railroads are proposing to some extent in response to the ANPR – simply cannot co-exist with the “one lump” theory. On the one hand, bottleneck rates could be obtained to pursue the benefits of competition on non-bottleneck segments by combining a maximum reasonable bottleneck rate with a competitively priced contract, while on the other hand, the “one lump” theory and the agency precedent applying it would be applied to presume that the shipper cannot benefit from such competition because the bottleneck rate will absorb any rate reductions achieved through competition. These two approaches are fundamentally inconsistent, and the most prudent course of action is to keep gateways open and permit shippers to obtain bottleneck rates, and no longer apply the “one lump” theory in rail merger proceedings.

#### **IV. Reciprocal Switching and Terminal Trackage Rights**

For the most part, the major Class I railroads’ response to the Board’s call in the ANPR for comments on whether the merger policy should be revised to require some form of reciprocal switching or trackage rights in terminal areas is to “just say no.” CSX Initial Comments at 22-23; CP Initial Comments at 15-16; NS Initial Comments at 46-48. In its comments, BNSF does not comment one way or the other – rather it takes the position that, if the STB decides to change its terminal switching rules, it should do so on an industrywide basis under a separate rulemaking. BNSF Initial Comments at 24.

Joint Commenters reiterate their position that the Board should revise its merger rules to adopt a presumption in rail merger proceedings in favor of establishing reciprocal switching and/or terminal trackage rights at a single rate in a terminal - and a reasonable distance beyond the terminal – for all connecting carriers. Initial Comments at 14-15. The rate for such service should be sufficient to cover the switching railroad’s costs, but should be set at a level that enhances the competitive options of captive shippers with access to the terminal. *Id.* Any agreements between the merging railroads and other railroads regarding switching in terminal areas would be closely scrutinized by the Board and accepted only if the terms and rate levels enhanced the options of shippers with access to the terminal. Joint Commenters note that the United States Department of Transportation supports the imposition of mandatory switching at all terminal areas on similar grounds. USDOT Initial Comments at 14-15. Joint Commenters agree with BNSF that such changes should be made to apply industrywide, but do not agree that such changes must be the subject of a separate rulemaking.

## **V.**

### **Smaller Class I Railroads, Short Lines, and Regional Railroads**

The salient issues regarding the participation of smaller Class I railroads, short lines, and regional railroads in a two-carrier rail system are summarized in the comments of the Kansas City Southern Railway (“KCS”), which review the Board’s adoption of its current “two is enough” policy in approving rail mergers and the serious shortfalls of that policy. KCS Initial Comments at 7-14. As rail customers dependent upon the present duopoly enjoyed by BNSF and UP in the western United States, Joint Commenters have experienced firsthand many of the shortfalls of this flawed policy, first and foremost of which are reduced competition and deteriorated rail service. The major Class I railroads’ position on smaller Class I railroads, short-

lines, and regional railroads is to simply maintain the *status quo*. See, e.g., UP Initial Comments at 15; BNSF Initial Comments at 28.

However, as stated in Joint Commenters' Initial Comments, a policy to improve rail service by enhancing the competitive options of rail customers as a result of a rail merger must entail measures to (1) facilitate the preservation of pre-merger opportunities to utilize a third carrier for some part of the rail service, (2) enhance the alternatives available to captive shippers; and (3) facilitate the ability of alternative railroads to provide rail service in the event that the rail service deteriorates after the merger is consummated. While Joint Commenters do not subscribe to all of the points raised in KCS's comments, they nevertheless agree that the general proposals made by KCS should be seriously considered by the Board in formulating its proposed rules subsequent to this ANPR proceeding.

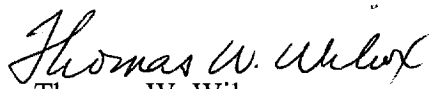
## **VI. Conclusion**

Joint Commenters respectfully request the Board to consider the views expressed in these Reply Comments and Joint Commenters' Initial Comments in formulating proposed modifications to the regulations applicable to rail mergers.

Respectfully submitted,



Nicholas J. D. Michael



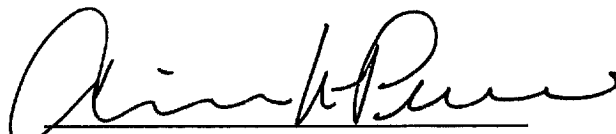
Thomas W. Wilcox  
Thompson Hine & Flory LLP  
1920 N Street, NW  
Washington, DC 20036  
(202) 331-8800

*Attorneys for Joint Commenters*

June 5, 2000

**CERTIFICATE OF SERVICE**

I hereby certify that I have served on this 5<sup>th</sup> day of June, 2000 a copy of the above Joint Reply Comments of Certain Coal Shippers by first class mail postage pre-paid, to all parties of record.



Aimee DePew